Kentucky Law Journal

Volume 17 | Issue 3 Article 6

1929

Liability of the Master for the Wilful, Wanton, or Malicious Acts of His Servant in Kentucky

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NOTES

LIABILITY OF THE MASTER FOR THE WILFUL, WANTON, OR MALICIOUS ACTS OF HIS SERVANT IN KENTUCKY

The earlier decisions, both in this country and in England, laid down the rule that the master is not liable for damages resulting from the wilful, wanton, or malicious acts of his servant unless done by his express direction or with his assent, even though the act was committed within the line of the servant's duties.[1]

A Kentucky case illustrative of the old doctrine may be found in the decision of *Brasher* v. *Kennedy*,[2] handed down in 1849. Brasher, the plaintiff, was the owner of two slaves. The servant of the defendant, Kennedy, wilfully and with full knowledge of all the circumstances, ferried the slaves across the river into Ohio to enable them to escape. The defendant's servant was operating a ferry across the Ohio River at the time and the act was done in the course of and within the scope of his employment. The slaves did escape but the master was not held liable. The court in commenting on the case, said, "The master is not liable for the wilful acts of his servant committed in the scope of his employment."

In recent years, however, the law as to this matter has undergone a marked change and it now seems to be settled that a master is liable for the wilful and malicious acts of his servant done in the course of and within the scope of his employment.[3]

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[1] *Lindsay* v. *Griffin*, 22 Ala. 629 (1853); *Puryear* v. *Thompson*, 5 Humphrey (Tenn.) 397 (1844); *Harris* v. *Nicholas*, 5 Munford (19 Va.) 483 (1817); *Cooke* v. *Illinois Central Ry. Co.*, 30 Iowa 202 (1870); *McManus* v. *Cricket*, 1 East 106, 102 Reprint 43; *Turner* v. *North Beach & Miss. Ry. Co.*, 34 Cal. 594 (1868).

[2] 10 B. Monroe, (Ky.) 28 (1849).

[3] *Louisville & Nashville Ry. Co.* v. *Eaden*, 122 Ky. 818, 93 S. W. 7 (1906); *Williams* v. *Southern Ry. Co.*, 24 Ky. Law Rep. 2214, 73 S. W. 779 (1903); *Penn. Iron Works Co.* v. *Voght Machine Co.*, 29 Ky. Law Rep. 861, 96 S. W. 551 (1906); *Chesapeake & Ohio Ry. Co.* v. *Francisco*, 149 Ky. 307, 148 S. W. 64 (1912); *Lexington Ry. Co.* v. *Cozine*, 23 Ky. Law Rep. 1137, 64 S. W. 848 (1901).

In the case of *Chesapeake and Ohio Ry. Co.* v. *Ford*,[4] the servants of the defendants threw boiling water on the plaintiff from one of the defendant's locomotives, injuring her. The court in holding the master liable, said: "The master is liable for the wilful and malicious acts of his servants, where such acts are done in the course of the employment and within the scope of the authority of such servant."

In *Willis* v. *Maysville Ry. Co.*,[5] a boy standing on a public street near the railroad track was struck and injured by a piece of ice kicked from the platform of the caboose of a passing freight train. The court held that the servant was acting within the scope of his authority and the company was, therefore, liable. To say that a servant, in kicking a piece of ice from the platform of the caboose of his master's freight train, is acting within the scope of his authority and in the line of his duties seems to be carrying the liability of the master almost to an extreme.

If the servant is not acting in the course of and within the scope of his employment when the acts complained of are committed, clearly the master is not liable. Where the servant steps aside from his employment, even for a very short period, to commit an act not in furtherance of his master's business and which is in no way incidental to it and where the act is done wilfully and maliciously to effect some private purpose of his own, the master cannot be held responsible.[6]

In the case of *Sullivan* v. *Louisville and Nashville Ry. Co.*,[7] a member of the defendant's switching crew found a torpedo and as a prank on the train crew placed it on the rail in front of the locomotive. The locomotive exploded the torpedo and the plaintiff, a switchman, was injured. In refusing damages to the plaintiff the court said: "Where the servant steps aside from his employment and assumes to act, and does act, solely on his own account, in a matter which the master has no more connection with than if he were the most complete stranger, it would not be logical and fair to make the master vicariously suffer for

[4] 158 Ky. 800, 166 S. W. 605 (1914).
[5] 122 Ky. 658, 92 S. W. 604 (1906).
[6] *Patterson* v. *Maysville & Big Sandy Ry. Co.*, 25 Ky. Law Rep. 1750, 78 S. W. 870 (1904); *Mace* v. *Ashland Ry. Co.*, 118 Ky. 885, 82 S. W. 612 (1904); *Louisville & Nashville Ry. Co.* v. *Routt*, 25 Ky. Law Rep. 887, 76 S. W. 513 (1903).
[7] 115 Ky. 447, 74 S. W. 171 (1903).

it." Such appears to be the general rule and later cases have adhered to it. In one of these cases[8] a very clear and concise rule was laid down by the court, namely, "If the servant steps aside from his master's business, for however short a time, to do an act not connected with this business, the relation of master and servant is for a time suspended."

Where a servant begins an altercation while acting in the course of and within the scope of his employment which immediately afterwards is followed by an assault the master will be held liable, as the law under the circumstances will not undertake to say when in the course of an asasult the wrong-doer ceased to act as agent and acted upon his own responsibility.[9] In *Wise* v. *Covington & Cincinnati St. Ry. Co.*,[10] the company was held liable for an assault by its conductor on a passenger, committed on the street and after the passenger had left the car, the court holding that the altercation having commenced in the car, the assault was merely a continuance of the wrong.

If a servant does an act merely to perpetrate a joke on a third person and the act is entirely disconnected with the purpose of the employment and is in no way in furtherance of the master's business, the master will not be rendered liable. In the case of *Mace* v. *Ashland Coal Ry. Co.*,[11] a servant of the defendant and the plaintiff were turning back upon the track a coal car which had been upset. During the course of the operations, the servant, wishing to play a joke on the plaintiff, shouted to him to jump for his life. The plaintiff jumped and was injured. The company was not held liable as the injury complained of resulted from the malicious and mischievous act of the servant, who was not acting in the line of his duty or scope of his authority, or for the purpose of furthering his master's business.

An exception to the general rule that a master is not liable for the wilful, wanton, or malicious acts of his servant committed outside the scope of and not within the course of his employment, may be found in cases where the master entrusts a dangerous instrumentality to the servant. In such cases the master

[8] *Cincinnati, New Orleans & Texas Pac. Ry. Co.* v. *Rue*, 142 Ky. 694, 134 S. W. 1144 (1918).

[9] *The New Ellerslie Fishing Club* v. *Stewart*, 29 Ky. Law Rep. 414, 93 S. W. 598 (1906).

[10] 91 Ky. 537, 16 S. W. 351 (1891).

[11] 118 Ky. 885, 28 Ky. Law Rep. 865, 82 S. W. 612 (1904).

who entrusts the custody, control, and use of any dangerous instrumentality to a servant will not be permitted to avoid responsibility for injuries inflicted thereby through the act of the servant on the ground that the servant in doing the particular act complained of was acting outside the scope of his employment and not in furtherance of his master's business.[12] However, it is necessary in order to hold the master responsible that the servant whose acts are complained of shall be the one to whose custody the article was confided and that it was permitted to inflict the injury while in the custody of this servant.[13]

If the master gives an order to a servant implying the use of force, the extent and kind of force to be used being left to the judgment and discretion of such servant, and if the servant in carrying out the command makes use of force in a manner or to a degree which is unjustifiable, the master will be liable.[14]

In *Robards* v. *P. Bannon Sewer Pipe Co.*,[15] a watchman employed by the defendants to guard their property mistook an infant for a wrong-doer and shot and injured him. The master was forced to respond in damages although the servant had gone beyond the strict line of his duty or authority, and inflicted an unjustifiable injury upon the infant.

"If, however, the servant, under the guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relationship of master and servant does not exist between them."[16]

Where the master owes to the plaintiff the performance of some special and particular duty, and confides the performance of that duty to a servant, he will be responsible if the duty is not performed by that servant. This liability seems to rest more,

[12] Compare *Georgia Ry. Co.* v. *Newsome*, 60 Ga. 492 (1878), and *Merschel* v. *Louisville & Nashville Ry. Co.*, 121 Ky. 620, 85 S. W. 710, 27 Ky. Law Rep. 465 (1905).

[13] It will be noticed that this is the ground of distinction between the case of *Merschel* v. *Louisville Railway Co.*, *supra*, and the case of *Sullivan* v. *Louisville & Nashville Ry. Co.*, 115 Ky. 447, 74 S. W. 171, and the reason for their different holdings.

[14] See Floyd R. Mechem, Agency, Vol. 1, page 1518.

[15] 130 Ky. 380, 113 S. W. 429 (1908).

[16] Floyd R. Mechem in 9 Michigan Law Review at page 100.

however, on the fact that there is a special duty owing to the public than upon the doctrine of *respondeat superior*. This doctrine has been very frequently applied in cases of common carriers of passengers.[17] While such carriers are not insurers of the safety of their passengers yet they will be held responsible if they do not exercie the highest degree of diligence and care to transport their passengers safely. In the case of *Sherley &c.* v. *Billings*,[18] an officer upon a passenger boat wrongfully assaulted a pasenger. The court in declaring the company liable, said: "Common carriers of passengers do not undertake to insure the safety of those subjecting themselves to their control; but the law holds them to the strictest responsibility for care, vigilance, and skill on the part of themselves and those employed by them."

The doctrine is now well established that the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow passenges, and the carrier and his servants, and for every violation of the implied contract by force or negligence, the carrier is liable in an action of contract or tort.[19]

It is not within the scope of this note to deal with the law in the other states in regard to this subject. The Kentucky cases, while not elaborately reasoned, are nevertheless consistent in result and line up with the great weight of authority. The present rules are the product of many years of experience and may well be defended both from the standpoint of theory and of logic. It is the opinion of the writer that the present rules are the sound ones and that they will continue, with slight modifications, to be the law on the subject for years to come.

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[17] *Chesapeake & Ohio Ry. Co.* v. *Francisco*, 149 Ky. 307, 148 S. W. 46 (1912); *Lexington Ry. Co.* v. *Cozine*, 23 Ky. Law Rep. 1137, 64 S. W. 848 (1901); *City Transfer Co.* v. *Robinson*, 12 Ky. Law Rep. 555 (1890); *Winnegar's Adm'rs* v. *Central Passenger Ry. Co.*, 85 Ky. 547, 4 S. W. 237 (1887); *Louisville & Nashville Ry. Co.* v. *Ballard*, 85 Ky. 307, 3 S. W. 530 (1887).

[18] 9 Bush (Ky.) 147 (1871).

[19] Addison on Torts, Vol. 1, page 33.